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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1075

WILLIAM J. BRUCKER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 16, 1965

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MISCELLANEOUS:

3 Am. Jur. 2d, Agency, §§ 73, 74 13
2 Cal. Jur. 2d, Agency, § 154 16

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The petitioner, William J. Brucker, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on November 18, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 338 F. 2d 427 and is reprinted in the appendix hereto, p. 1a, *infra*.

The findings of fact, conclusions of law and judgment of the United States District Court for the Southern District of California, Northern Division (Mathes, D. J.), are not reported but are reprinted in the appendix hereto, p. 6a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on November 18, 1964. A timely petition for rehearing was denied on January 19, 1965. This petition for a writ of certiorari is filed within 90 days thereafter.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the United States is liable, under the Federal Tort Claims Act, for the negligent acts of an individual who is reasonably assumed by an injured third party to be a servant or agent of the United States and to be acting within the scope of his ostensible authority.

2. Whether, in determining the liability of the United States under the Federal Tort Claims Act, the federal *respondeat superior* doctrines or the *respondeat superior* doctrines of the State wherein the accident occurred govern (a) the determination of an individual's ostensible authority to act as a servant or agent of the United States, and (b) the determination whether such individual was acting within the scope of his ostensible authority.

STATUTES INVOLVED

The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, and 2674, provides in pertinent part:

> § 1346(b). Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, occuring on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or ommission occurred.
>
> * * * * * * * *
>
> § 2671. Definitions.
>
> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—
>
> "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.
>
> "Employees of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency, in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.
>
> "Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.
>
> * * * * * * * *

§ 2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

STATEMENT

The petitioner brought this action under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), to recover damages for injuries received in the crash of an airplane negligently operated by an alleged employee of the United States.[1] A full trial without jury was had before the District Court. From the District Court's findings of fact (see pp. 6a-11a, *infra*) and from other facts of record, the relevant and largely uncontested factual situation may be summarized as follows:

(1) The Castle Air Force Base Aero Club, located in California, is concededly "a non-appropriated fund instrumentality of the United States" and "an activity of the Sundry Fund under the auspices of and in furtherance of the mission of the Air Force." R. 5; and see Finding II. The Club, organized in 1957, is designed to provide off-duty recreational activities for its membership, which is open to officers, enlisted personnel and civilian employees of the Air Force and dependents thereof. A prime purpose of the Club, as the Court of Appeals noted (p. 1a, *infra*), is "to give authorized personnel an opportunity to fly for recreation and the development of aeronautical skills."

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[1] On petition of the United States, the action was removed pursuant to 28 U.S.C. § 1442a from the Superior Court for the County of Merced, California, to the United States District Court for the Southern District of California, Northern Division. R. 2-7.

Membership in the Club is voluntary. The organization has its own constitution and by-laws, elects its own officers and is self-supporting from its dues and fees. The Club is controlled by an elected executive board, and the organization's business and operation are under the supervision of a president. Among the president's responsibilities is that of determining the suitability and qualifications of members for all flight operations.

(2) The Club owns various airplanes, including an Aeronca Champion airplane, which are available for lease or rent by the members on an hourly basis. Finding II. The Club also maintains a list of flight instructors at its headquarters, some of whom are not Club members. The individuals so listed are qualified by the Federal Aviation Agency to give flight instruction. Finding V. Members of the Club desiring flight instruction select the name of an instructor from this list, make arrangements with him and generally pay the instructor $3.00 per hour for instructions. Finding V.

(3) The Club also maintains a list of "check pilots." These are licensed pilots authorized by Club rules to "check out" or test other licensed pilots in airplanes they had not previously flown. Finding VI. Check pilots are authorized to fly Club airplanes with passengers but, without an instructor's license, they are not authorized to give flight instruction to student pilots. Tr. 156-157, 165-166.

(4) In 1959, petitioner was an enlisted man in the Air Force with the rank of technical sergeant. He was assigned to Castle Air Force Base as a fire fighting supervisor. He was also a member of the Club. As a

member, he had been given a series of instruction flights by various instructors he had selected from the Club list. Tr. 59-62. Included among his instructors so selected was Sgt. Graves, who was also the Club president. Findings IV and VII. On May 29, 1959, one of the numerous occasions when petitioner selected Sgt. Graves for instruction, Sgt. Graves arranged for a Lt. Hammack to replace him on the instruction flight. And Lt. Hammack then proceeded to fly with and instruct the petitioner. Tr. 63-68.

(5) Thereafter, petitioner made an appointment with Sgt. Graves to receive additional flight instruction on the morning of June 6, 1959. Tr. 72. But due to a call to military duty that morning, petitioner did not arrive at the airfield until the afternoon, hoping that Sgt. Graves would still be there. Tr. 75. Sgt. Graves was not there. Lt. Hammack, who was present, stated (apparently in response to an inquiry by petitioner) that he was waiting to check out someone in an aircraft but that if there was a plane available he would take petitioner up in the meantime. Tr. 76. Petitioner then checked the list of available aircraft, found that an Aeronca Champion was available, and signed up for it. Tr. 76. Petitioner and Lt. Hammack then took off in this two-seater plane, petitioner in the front seat and Lt. Hammack in the rear control seat.

(6) At about 3 p.m., while Lt. Hammack was flying the airplane and attempting to demonstrate to petitioner a low altitude, down wind, power off, forced landing procedure, the airplane crashed and petitioner sustained serious injuries. Tr. 77-78. The District Court found that the accident and injuries were the proximate result of negligent flight maneuvers by Lt.

Hammack, maneuvers which were not authorized by Sgt. Graves. Conclusion 1; Finding VII. There was no mechanical difficulty with the plane; petitioner was not in any way contributorily negligent and did not assume the risk of the injuries sustained or of the negligent flying. Conclusions III and IV.

(7) Lt. Hammack, while a rated military pilot and a qualified check pilot, was not a qualified flight instructor and his name was not listed as an instructor at the Club headquarters. He was, however, a member of the Club. Finding VII. While there were no express financial arrangements between petitioner and Lt. Hammack, the District Court found an implied promise on petitioner's part to pay Lt. Hammack the customary fee of $3.00 per hour. Finding IX.

(8) Sgt. Graves, as Club president, was orally found to be "an agent of the United States." Tr. 219. As such, he had authority to consent to or disapprove or forbid any particular flight and to designate a particular instructor pilot or check pilot to fly with a particular student. Finding VIII. It was found that he had in fact authorized the earlier flight by Lt. Hammack with petitioner on May 29, 1959. While there was no evidence that Sgt. Graves "expressly authorized" Lt. Hammack to make the flight on the day in question, June 6, 1959, Finding VIII, the court orally found that Sgt. Graves had "impliedly authorized the flight in question." Tr. 222; and see p. 5a, *infra*.

The negligent maneuver by Lt. Hammack which caused the accident was found "not authorized" by Sgt. Graves, and "there was no negligence by Sgt. Graves in his management of the Castle Air Force

Base Aero Club." Finding VII. There was also found to be no mechanical difficulty with the plane in question. Finding VIII. While no specific finding was made as to whether Sgt. Graves was a servant of the Club, his position and authority as an unpaid president of the Club were uncontradicted.

After concluding that the accident was due to Lt. Hammack's negligence, the District Court ruled that Lt. Hammack was not acting as an agent of the Club and hence was not an agent of the United States at the time of the flight in question. Lt. Hammack was found not to be acting within the line of duty nor within the scope of any office or employment of the Club at this point. And it was found that petitioner's injuries were not incident to his military service since the flight was an independent recreational activity provided by the Government. Conclusions II, VI and VII. The court accordingly dismissed the action for want of jurisdiction over the United States under the Federal Tort Claims Act.

The Court of Appeals for the Ninth Circuit affirmed, holding that the District Court could reasonably find from the record that Lt. Hammack was not the servant of the Club and that liability could not be imposed on the United States for acts of persons not its servants simply because the Government encouraged the activity and derived benefit from it. In footnote 2 of its opinion (see p. 2a, *infra*), the Court of Appeals stated:

> By the terms of the Federal Tort Claims Act, the United States consents to be sued for injuries caused by acts of an "employee of the Government". 28 U.S.C.A. § 1346(b). Whether a given person is an "employee of the Government" with-

> in the meaning of the Act is, of course, a question of federal law. *United States* v. *Hamline,* 315 F. 2d 153, 156 (10th Cir. 1963). The word "employee" is to be read as having the same general meaning in the Act as the term "servant" has in the body of rules relating to the doctrine of respondent superior (see Re-statement, (Second) Agency § 220, comment g (1958)); see also, *Strangi* v. *United States,* 211 F. 2d 305, 307-308 (5th Cir. 1954); *Thomas* v. *United States,* 204 F. Supp. 896 (D. Vt. 1962), since "[t]he policy of the act is to fix Government liability under the doctrine of respondeat superior * * *" *United States* v. *Holcombe,* 277 F. 2d 143, 145 (4th Cir. 1960); see also, *Williams* v. *United States,* 350 U.S. 857, 76 S. Ct. 100, 100 L. Ed. 761 (1955). In the disputed finding the district court used the term "agent" in this same sense.

The Court of Appeals further noted that while Lt. Hammack's employment as a check pilot or flying instructor was subject to little if any control in the performance of his task, the petitioner determined the broad questions of time, place and duration of the flight. And the Club had no contractual arrangement with Lt. Hammack, did not compensate him and neither possessed nor exercised any power to control his conduct of the flight. The listing of available instructors by the Club, said the Court, could reasonably be viewed as a Club service for the convenience of members rather than evidence of a master-servant relationship between the Club and the listed pilots. See p. 4a, *infra.*

Finally, the Court of Appeals ruled that the District Court's finding that Sgt. Graves was not negligent in authorizing Lt. Hammack to operate the plane was not "clearly erroneous." "Although not a qualified flight instructor," said the Court of Appeals, "Lt. Hammack

was a licensed pilot, fully competent to fly the plane with Sgt. Brucker [the petitioner] as a passenger. The [district] court could conclude that Sgt. Graves had done no more than impliedly authorize just such a flight." See p. 5a, *infra*.

REASONS FOR GRANTING THE WRIT

The decision below raises highly important questions as to the liability of the United States under the Federal Tort Claims Act for the negligence of an ostensible agent acting within the scope of his ostensible authority. These are questions that have not been but should be resolved by this Court.

The critical fact in this case is that the Castle Air Force Base Aero Club is an instrumentality of the United States. As such, its employees and agents are employees and agents of the United States—and their negligent acts within the scope of their employment can subject the United States to liability under the Act.

Recognizing that critical fact, the Court of Appeals below treated as "not clearly erroneous" the District Court's conclusions that (1) Lt. Hammack—whose actions were found to be negligent—was not an agent of the Club at the time of the accident, and (2) Sgt. Graves was not negligent. But the appellate court did something far more significant than find sufficient evidence to support the District Court's conclusions. And the resulting appropriateness of this Court's review rests on far more substantial grounds than a claimed error of substantial proportions in the concurrent findings of fact by two courts below. Cf. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

The significant element of the decision below which leads to the necessity of review by this Court is to

be found in footnote 2 of the opinion below, p. 2a, *infra*. The Court of Appeals there set forth the purported legal premise underlying its ruling, i.e., that whether a given person is an employee of the United States for purposes of the Federal Tort Claims Act is a question of federal law and that the word "employee" has the same general meaning as the terms "servant" and "agent" under *respondeat superior* doctrines. The court then proceeded to review the evidence and the trial court's conclusions without meaningful reference to relevant *respondeat superior* doctrines and without determining the applicability in these circumstances of the California *respondeat superior* doctrines—all of which had been fully pressed upon the court by the petitioner. Thereby raised are substantial questions meriting full review by this Court:

(1) Assuming that an individual's status as an employee or servant of the United States for purposes of the Tort Claims Act is a matter of federal law,[2] the significant question is raised whether all of the normal master-servant relationships must be present before concluding that an individual is a federal employee or servant. The courts below treated the absence of any contractual arrangement between the Club and Lt. Hammack and the absence of any control by the Club over his actions as a check pilot or flying instructor as decisive of Lt. Hammack's independent status. See p. 4a, *infra*.

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[2] "The fact of employment must be determined under federal law . . ." *United States* v. *Hainline*, 315 F. 2d 153, 156 (C.A. 10); and see *Blackwell* v. *United States*, 321 F. 2d 96, 98 (C.A. 5). "Scope of employment, as distinguished from fact of employment, is determined by state law." *Pattno* v. *United States*, 311 F. 2d 604, 607 (C.A. 10).

But those considerations might not have been decisive if the Court of Appeals had applied what it conceded in footnote 2 of its opinion to be the law—that the word "employee" in this Act has the same meaning as "servant" under *respondeat superior* doctrines and that the policy of the Act is to fix Government liability under those doctrines.[3] See *Williams* v. *United States*, 350 U.S. 857.

As at least one federal court has ruled, the application of federal law in this context does not mean "that only a person officially on a federal payroll may come within the definition of federal employee." *Martarano* v. *United States*, 251 F. Supp. 805, 807 (D. Md.). In District Judge Thompson's words in that case, "The usual rules of *respondeat superior* are to be applied. This is quite plainly recognized in the statutory definition [§ 2671] of employee of the Government by apt words encompassing persons 'acting on behalf of a federal agency', 'temporarily or permanently', 'whether with or without compensation.'" *Ibid.*, 807-808.[4]

And under the usual and the generally recognized rules of *respondeat superior*, if the principal has justified the belief of a third party (1) that a person appears to be acting as the agent or servant of the principal and (2) that such person is acting within the scope of his ostensible authority, the principal may be held

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[3] "The policy of the act is to fix Government liability under the doctrine of *respondeat superior* just as if the United States were a private employer." *United States* v. *Holcombe*, 277 F. 2d 143, 146 (C.A. 4).

[4] In the *Martarano* case, the court held that an employee of the State of Nevada was a federal employee, for Federal Tort Claims Act purposes, while on official loan to a federal agency pursuant to a cooperative federal-state agreement concerning control of predatory animals and while under the direct supervision and control of the federal agency.

liable for injuries received by the third party who relies in good faith on this ostensible authority. See 3 Am. Jur. 2d, Agency, §§ 73, 74. As this Court long ago held in *Townsend* v. *Chappell* (*Bronson's Executor* v. *Chappell*), 12 Wall. 681, 683:

> Agents are special, general or universal. Where written evidence of their appointment is not required, it may be implied from circumstances. These circumstances are the acts of the agent and their recognition or acquiescence by the principal. The same considerations fix the category of the agency and the limits of the authority conferred. Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defense. If a loss is to be borne, the author of the error must bear it. If business has been transacted in certain cases it is implied that the like business may be transacted in others. The inference to be drawn is, that everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned. Under such circumstances the presence or absence of authority, in point of fact, is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences. In either case the legal result is the same.

See also *Cowdrey* v. *Vandenburgh*, 101 U.S. 572; *Calais Steamboat Co.* v. *Scudder*, 2 Black 372.

Application of the foregoing federal principles could justify the conclusion that Lt. Hammack had ostensible authority as an agent or servant of the Castle Air Force Base Aero Club and that he was acting within the scope of that seeming authority when the plane crash occurred. Sgt. Graves, as president of the Club and as an agent of the United States, was found to have authority respecting the qualifications of all members for every type of flight operation, with power to approve or disapprove any flight and to designate a particular flight instructor or check pilot to fly with a particular member. Finding VIII. And it was further found that Sgt. Graves had in fact "authorized" the May 29 flight with Lt. Hammack as flight instructor (Finding VIII) and that Sgt. Graves "had done no more than impliedly authorized" (see p. 5a, *infra*) that June 6 flight in question, again with Lt. Hammack as flight instructor.

In these circumstances it would be rational to conclude that the Club, an instrumentality of the United States acting through its president, knowingly held out to petitioner that Lt. Hammack was a flier qualified to instruct and fly with petitioner in an airplane owned by the Club. And the petitioner could rationally conclude that Lt. Hammack, in flying with petitioner on the express or implied authority of the Club president, was acting as an agent of that Club and within the scope of this apparent authority. By virtue of Sgt. Graves' authority to control the flight and to designate the instructor, Lt. Hammack was subject to the control of the Club in this context.

This, then, is not a case to be resolved solely on the formalities of a master-servant relationship. Cf. *State of Maryland for the Use of Levin* v. *United States*,

No. 345, Oct. Term, 1964, now pending before the Court for decision; *United States* v. *Hainline,* 315 F. 2d 153 (C.A. 10).[5] Rather, the issue is whether the concepts of ostensible agency and ostensible authority can be invoked in determining the liability of the United States and its instrumentalities under the Tort Claims Act. This Court has already recognized that the Act includes not only the normal principles of liability but "extends to novel and unprecedented forms of liability as well." *United States* v. *Muniz,* 374 U.S. 150, 159. And as long as such novel and unprecedented liability can be imposed, as it is, upon private individuals "under like circumstances," the United States enjoys no immunity from suit under this Act. *Indian Towing Co.* v. *United States,* 350 U.S. 61, 64.

Certiorari should therefore be granted to determine the applicability of these *respondeat superior* doctrines. As the activities of the United States and its countless agencies and agents continue to expand, the likelihood of more claims grounded upon these doctrines is a real one. The lower federal courts need the guidance which only this Court can give in fairly resolving such contentions.

(2) Another substantial question meriting review is that dealing with the applicability of the California *respondeat superior* doctrines to the facts of this case. By failing to define in footnote 2 of its opinion whether

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[5] The *Hainline* case involved a damage action against the United States under the Tort Claims Act for injuries sustained when the plaintiff's automobile was struck by an airplane flown by an Air Force officer, flying for his own enjoyment as a member of an Air Force Aero Club in Kansas. The court there ruled that the officer was not flying as an agent or employee of the Club simply because he was a Club member. 315 F. 2d at 156. There was no occasion to consider the *respondeat superior* doctrines as respects a holding out of the officer as an agent and justifiable reliance by a third party on such ostensible authority.

federal or state *respondeat superior* rules govern, the court below has injected confusion and uncertainty into this area, thereby augmenting the need for definitive action by this Court.

It has been said many times, in cases dealing solely with the statutory concept of "scope of employment," that the *respondeat superior* doctrines of the state wherein the injury occurred are controlling. See *Williams* v. *United States,* 350 U.S. 857; *Cannon* v. *United States,* 243 F. 2d 71, 73 (C.A. 5); *United States* v. *Holcombe,* 277 F. 2d 143, 146 (C.A. 4). Section 1346(b) of Title 28 expressly states that liability shall be imposed for the negligent act of any federal employee acting within the scope of his employment, if a private person under such circumstances would be liable, "in accordance with the law of the place where the act or omission occurred."

The negligent act in this case occurred within California. And under the California concepts of *respondeat superior* a principal may be held liable for the torts of his ostensible agent acting within the scope of the ostensible agency. As summarized in 2 Cal. Jur. 2d, Agency, § 154, "the doctrine of ostensible agency is . . . applicable to torts committed by an agent within the scope of his ostensible authority. . . . No reason exists why a principal, who through fault or negligence has permitted an ostensible authority, should be exonerated from liability for the torts of the ostensible agent, any more than should the principal in the case of an actual agency."[6]

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[6] Thus in *Donnelly* v. *San Francisco Bridge Co.,* 117 Cal. 417, 49 P. 559, a principal was held liable for injuries sustained by a workman who had been hired by a superintendent whose relationship to the principal had been secretly terminated; the superintendent was held to be an ostensible agent. In *Barton* v. *Studebaker Corp.,* 46 Cal. App. 707, 721, 189 P. 1025, the *Donnelly* case was

It seems clear that when a federal court is called upon to determine under the Tort Claims Act both the fact and the scope of federal employment in terms of ostensible agency and ostensible authority, the state law of *respondeat superior* must be applied as to both concepts. In dealing with what is ostensible, the actual fact of employment—or the absence thereof—is immaterial. And both the fact of ostensible agency and the scope of that agency appear to be so intertwined as to be inseparable. The representations made by the principal, the nature and reasonableness of the third party's reliance thereon and the seeming authenticity of the agent's authority are relevant and decisive both as to the ostensible agency and the scope thereof. As was said in *State of Maryland to the Use of Bennus* v. *United States*, 221 F. Supp. 740, 743-744 (E.D. Pa.), a federal court "may not apply its own standards to the question of apparent authority or agency relationship, but is bound by the *respondeat superior* doctrine of Maryland, the state in which the accident occurred."

In other words, the federal law as to who is a federal employee for purposes of this Act may perforce be required to borrow the state law as to ostensible agency

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explained on the theory that the injured employee was entitled to know who his employer was and that the prior employment of the plaintiff gave rise to a duty on the part of the principal to notify him of the change of employers.

See also *Lowmiller* v. *Monroe, Lyon & Miller*, 101 Cal. App. 147, 281 P. 433, 282 P. 537, where plaintiff, a prospective purchaser of land in defendant's tract, rode with a bus driver to the land, relying upon representations of the defendant that the driver was defendant's employee. In *Hedlund* v. *Sutter Med. Serv. Co.*, 51 Cal. App. 2d 327, 331, 124 P. 2d 878, a hospital which accepted plaintiff as a patient was held estopped to deny that the nurse giving negligent treatment was its employee. And see *Duvall* v. *T.W.A.*, 98 Cal. App. 2d 106, 219 P. 2d 463.

relationships in making that determination. In a situation where a private principal would be liable under state law solely because of an ostensible agency relationship, the United States may also be liable on the same basis without regard to the employer-employee concepts which usually prevail as a matter of federal law. And since the recognized policy of the Act "is to fix Government liability under the doctrine of *respondeat superior* just as if the United States were a private employer," *United States* v. *Holcombe*, 277 F. 2d 143, 146 (C.A. 4), it would be consistent with that policy to apply the whole state law of *respondeat superior* where it cannot be conveniently broken down into component federal and state parts.

To determine the applicability of the California rule of ostensible agency to the facts of this case, review of the decision below becomes most appropriate. The problem is necessarily an important and recurring one in the administration of the Federal Tort Claims Act; and it is a problem that was treated both improperly and inadequately by the court below.

CONCLUSION

For these various reasons, a writ of certiorari should issue to review the judgment and opinion below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18828

Nov. 18, 1964

WILLIAM J. BRUCKER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

T. N. Petersen, Merced, Cal., for appellant.

John W. Douglas, Asst. Atty. Gen., Morton Hollander, David L. Rose, Attys., Dept. of Justice, Washington, D. C., Francis C. Whelan, U. S. Atty., Los Angeles, Cal., for appellee.

Before JERTBERG, BROWNING and DUNIWAY, Circuit Judges.

BROWNING, Circuit Judge:

The Castle Air Force Base Aero Club is an instrumentality of the United States, organized and operated under the auspices of the Air Force[1] to give authorized personnel an opportunity to fly for recreation and the development of aeronautical skills.

Sgt. Brucker, a member of the Club, was injured in the crash of a Club plane flown by Lt. Hammack, another Club member. Sgt. Brucker sued the United States under the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b). The district court dismissed the action after trial.

1. The district court found that the accident resulted from Lt. Hammack's negligence, but that "Lt. Hammack was not acting as an agent of the Club and hence not an

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[1] United States v. Hainline, 315 F. 2d 153, 156 (10th Cir. 1963). Cases involving similar agencies are collected in Rizzuto v. United States, 298 F. 2d 748, 749 (10th Cir. 1961).

agent of the Government at the time of the flight in question." The court concluded that the United States had not consented to be sued for Lt. Hammack's negligent acts.[2] Sgt. Brucker attacks the quoted finding as clearly erroneous.

"This is," as the district court said, "a difficult case." There was substantial proof in support of Sgt. Brucker's side of the disputed issue. But there was also substantial support for the district court's finding, and "on the entire evidence" we are not "left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).[3]

Sgt. Brucker's position is that Lt. Hammack was a servant of the Club in that he was a "check pilot," and also, at least ostensibly, a "flight instructor."

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[2] By the terms of the Federal Tort Claims Act, the United States consents to be sued for injuries caused by acts of an "employee of the Government". 28 U.S.C.A. § 1346(b). Whether a given person is an "employee of the Government" within the meaning of the Act is, of course, a question of federal law. United States v. Hainline, 315 F. 2d 153, 156 (10th Cir. 1963). The word "employee" is to be read as having the same general meaning in the Act as the term "servant" has in the body of rules relating to the doctrine of *respondeat superior* (see Restatement, (Second) Agency § 220, comment g (1958); see also, Strangi v. United States, 211 F. 2d 305, 307-308 (5th Cir. 1954); Thomas v. United States, 204 F. Supp. 896 (D. Vt. 1962)), since "[t]he policy of the act is to fix Government liability under the doctrine of *respondeat superior* • • •." United States v. Holcombe, 277 F. 2d 143, 146 (4th Cir. 1960); see also, Williams v. United States, 350 U.S. 857, 76 S. Ct. 100, 100 L. Ed. 761 (1955). In the disputed finding the district court used the term "agent" in this same sense.

[3] Weighing the evidence in the light of the relevant criteria to determine whether a master-servant relationship existed between Lt. Hammack and the Club, and hence the United States, is an exercise of the fact-finding function. Restatement (Second), Agency § 220 at comment c.

The Air Force directive under which the Club was organized provided that "appropriate operational and administrative procedures" should be "established and followed to insure maximum safety in flight." Air Force Reg. No. 34-14, par. 6a. Among the regulations adopted by the Club were two relating to "check rides" and "authorized flight instructors." The first provided that in certain circumstances pilots were required to complete a "check flight" with a "check pilot" before flying Club aircraft, and set out the qualifications of a check pilot.[4] The second regulation provided that only persons certified by the Civil Aeronautics Administration as flight instructors[5] were authorized to give flight instruction in Club aircraft. Lists of locally available check pilots and flying instructors were maintained at Club headquarters.

A member wishing to take flight instruction in a Club plane selected a flight instructor from among those listed by the Club, and made his own arrangements directly with that instructor. The member usually paid the instructor three dollars an hour. Apparently the same procedure was followed in securing the services of a check pilot for a check flight in a Club plane. Neither check pilots nor flight instructors had contractual arrangements with the Club or received compensation from the Club.

Lt. Hammack was a qualified check pilot. He was not a flying instructor, and did not appear on the Club's roster

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[4] Par. 7 of Club Reg. No. 3-6 reads :

> Check pilots are defined as: 1. All Club recognized flight instructors current in the type of aircraft to be flown, and 2. others who meet the following requirements:
>
> A. Private pilots license or higher.
>
> B. Minimum of 100 hours total time.
>
> C. Be checked by a designated instructor in the aircraft in which he will conduct check flights.
>
> D. Be approved by the Board of Governors.

[5] 14 C.F.R. § 61.171 to .177.

as such. However, Sgt. Brucker contends that the Club president, Sgt. Graves, held Lt. Hammack out to be a flight instructor by arranging on an earlier occasion to have Lt. Hammack take Sgt. Brucker on an instructional flight. The Club by-laws provided that the president of the Club could "make and enforce decisions regarding the suitability of all equipemnt and the qualifications of all members for every type of flight operation," and it is conceded that Sgt. Graves could approve or disapprove any flight and designate a particular flight instructor or check pilot to fly with a particular member.

On the day of the accident Sgt. Brucker went to the field to arrange a supervised solo with Sgt. Graves (who was an authorized flight instructor as well as Club president), but Sgt. Graves was not there. Sgt. Brucker asked Lt. Hammack to fly with him, and the Lieutenant agreed to do so. Sgt. Brucker rented a Club plane, and he and Lt. Hammack took off. The court found (and the finding is not contested) that Sgt. Brucker impliedly promised to pay Lt. Hammack the customary three dollar hourly fee.

Thus, in accordance with the usual practice, Sgt. Brucker himself selected Lt. Hammack, made his own arrangements with Lt. Hammack, and agreed to compensate Lt. Hammack. Although the nature of Lt. Hammack's employment as a check pilot (or flying instructor) was such that he was subject to little if any control by anyone in the performance of his tack, broad questions of the time, place, and duration of the flight were determined by Sgt. Brucker.

On the other hand, the Club had no contractual arrangement with Lt. Hammack, did not compensate him, and neither possessed nor exercised any power to control his conduct of the flight. The district court could reasonably view the listing of available check pilots and flying instructors as a service provided by the Club for the convenience of members, rather than evidence of a master-servant relationship between the Club and the listed pilots. The Club regulations relating to check pilots and flying

instructors, and the by-law provision empowering the president to approve or disapprove particular flight arrangements, could be regarded not as manifestations of a control by the Club over check pilots and flying instructors as servants, but rather as reflecting the Club's control over Club planes and the activities of Club members in the interest of air safety.

On this record the district court could reasonably find that Lt. Hammack was not the servant of the Club. And liability could not be imposed upon the United States for acts of persons not its servants simply because the government encouraged the activity and derived benefit from it. United States v. Hainline, 315 F.2d 153, 155 (10th Cir. 1963); Wright, The Federal Tort Claims Act 51 (1957).

2. Sgt. Brucker argues that even if Lt. Hammack was not a servant of the Club, Sgt. Graves was,[6] and that Sgt. Graves negligently authorized Lt. Hammack to operate the plane.

The government contends that this issue may not be raised on appeal because it was not included in the recitation of issues in the pretrial order. But the district court passed upon the issue, expressly finding that Sgt. Graves had not been negligent; and "[e]ven if the pre-trial order must be read as narrowly as appellee desires to read it, it must be considered to have been amended by the trial court's findings." American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640, 648 (9th Cir. 1961).

The district court's finding that Sgt. Graves was not negligent is not clearly erroneous. Although not a qualified flight instructor, Lt. Hammack was a licensed pilot, fully competent to fly the plane with Sgt. Brucker as a passenger. The Court could conclude that Sgt. Graves had done no more than impliedly authorized just such a flight.

Affirmed.

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[6] The district court made no finding as to whether Sgt. Graves was a servant of the Club.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
NORTHERN DIVISION

No. 2088-ND

WILLIAM J. BRUCKER, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

Findings of Fact, Conclusions of Law, and Judgment

The above entitled matter, having come on for trial on February 15, 1963, and for argument on February 21, 1965, before the Honorable William C. Mathes, said trial and argument having been held at Fresno, California, and plaintiff being represented by Ben Curry, Jr., Esq., and T. N. Petersen, Esq., and defendant being represented by Francis C. Whelan, United States Attorney; Donald A. Fareed, Assistant United States Attorney, Chief, Civil Division; and Timothy M. Thornton, Assistant United States Attorney, and the Court having heard the evidence on February 15, 1963, and the argument of counsel on February 21, 1963, and the cause having been submitted for decision and the Court being fully advised in the premises, now makes the following Findings of Fact, Conclusions of Law, and Judgment:

FINDINGS OF FACT

I

At the Castle Air Force Base Aero Club on June 6, 1959, Technical Sergeant William J. Brucker asked Lieutenant Maurice Hammack to accompany him on a flight in an Aeronca Champion dual-control airplane. Both men, on that occasion, were members of the USAF and both were in an off-duty status. Sgt. Brucker was assigned to Castle Air Force Base as a fire fighting supervisor and

Lt. Hammack was a military pilot attending a training school at Castle Air Force Base. Both plaintiff and Lt. Hammack were members of the Castle Air Force Base Aero Club on June 6, 1959.

II

The Aeronca Champion was owned by the Castle Air Force Base Aero Club, an agency and instrumentality of the United States of America. The plane had been leased or rented, on an hourly basis, on the date of the accident, on June 6, 1959, by the plaintiff, William J. Brucker, as a member of the Castle Air Force Base Aero Club.

III

At the time of the accident, Lt. Hammack was at the controls of said aircraft, in the rear seat thereof; while Sgt. Brucker was in the front seat. The crash occurred about 3:00 P.M. when Lt. Hammack attempted to demonstrate to Sgt. Brucker a low altitude, down wind, power off, forced landing procedure.

IV

On the date in question Master Sergeant Everett C. Graves was the president of the Castle Air Force Base Aero Club. The club was open to membership to all Air Force personnel and their dependents as a recreational facility of the United States Air Force. The club had its own constitution and regulations and elected its own officers.

V

Qualified flight instructors were listed on an acetate board at the club headquarters. A qualified flight instructor was one who had been so qualified by the Federal Aviation Agency (14 C.F.R. § 20.5) and who had been also selected by the Castle Air Force Base Aero Club as one

available to give instructions to its members. It was the custom and practice of student pilots who were members of the club to pay $3.00 an hour for instructions to a qualified flight instructor selected by the student. This fee was retained by the flight instructor in return for his services.

VI

"A check pilot" was a phrase used by club members to designate a pilot who was authorized by the Castle Air Force Base Aero Club, in accordance with Rule 3-6, paragraph 7, of said Club.

VII

On the date in question, Master Sergeant Everett C. Graves was a qualified flight instructor and his name was listed on the acetate board at club headquarters. Sgt. Brucker had arrangements to take instruction from Sgt. Graves on the morning of the accident. On June 6, 1959, Sgt. Graves was not available to give flight instruction when Sgt. Brucker leased the plane in the afternoon. Lt. Hammack was not a qualified flight instructor and his name was not listed on the board at club headquarters. At the time of the accident, Sgt. Brucker was a qualified student pilot and Lt. Hammack was a rated military pilot. As a proximate result of the negligent flight procedure of Lt. Hammack the plane crashed and plaintiff, Sgt. Brucker, sustained serious injury. The particular maneuver was not authorized by Sgt. Graves and there was no negligence by Sgt. Graves in his management of the Castle Air Force Base Aero Club. There was no mechanical difficulty with the plane.

VIII

Sgt. Graves had the authority to consent to or disapprove or forbid any particular flight, and to designate a particular instructor pilot or check pilot to fly with a par-

ticular student. Furthermore, Sgt. Graves had, on a previous occasion several days prior to June 6, 1959, authorized a flight by Lt. Hammack with the plaintiff; however, there is no evidence that Sgt. Graves *expressly authorized* Lt. Hammack to make the flight on the day in question. Lt. Hammack was not an authorized flight instructor by either the club or the Federal Aviation Agency.

IX

While there were no express financial arrangements between Lt. Hammack and Sgt. Brucker previous to the flight in question, there was an implied promise on the part of Sgt. Brucker to pay Lt. Hammack the customary $3.00 per hour fee.

X

Lt. Hammack was not acting as an agent of the club and hence not an agent of the Government at the time of the flight in question.

CONCLUSIONS OF LAW

I

The injuries sustained by William J. Brucker were the proximate result of the negligence of Lt. Maurice Hammack.

II

The plaintiff, William J. Brucker, was not injured incident to military service within the meaning of *Feres* v. *United States*, 340 U.S. 135 (1950). On the contrary the plaintiff's injuries did not arise out of or in the course of military duty inasmuch as the flight involved was an independent recreational activity provided by the Government.

III

The plaintiff was not contributorily negligent.

IV

The plaintiff did not assume the risk of the injuries sustained, or of negligent flying, by requesting Lt. Hammack to accompany him on the flight in question.

V

Sgt. Brucker was not a guest of Lt. Hammack during the flight in question within the meaning of the California Aircraft Guest Statute, California Public Utilities Code, Sec. 21406.

VI

Lt. Hammack was not acting in the line of duty nor within the scope of any office or employment of the Castle Air Force Base Aero Club at the time of the accident in question, within the meaning of 28 U.S.C. 2671.

VII

Inasmuch as the plaintiff has failed to show that Lt. Hammack was acting within the scope of any office or employment, there has been no showing that the Government has consented to be sued in this Court for his negligent actions, and accordingly the case is dismissed for want of jurisdiction over the person of United States of America. However, this shall not be considered an adjudication on the merits but rather a dismissal of the action for the failure of the plaintiff to establish jurisdiction, Rule 41(b), Federal Rules of Civil Procedure.

JUDGMENT

In accordance with the foregoing findings of fact and conclusions of law, IT IS ORDERED, ADJUDGED AND DECREED:

That this action for recovery of damages for personal injuries under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), is dismissed, for the reason that the plaintiff has failed to establish that this Court has jurisdiction over the person of the defendant, in that there is no showing that the negligent act was performed by an agent of the United States of America either within the scope of his employment or within his line of military duty.

DATED: March 13, 1963.

WM. C. MATHES
United States District Judge